IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.06.2007

CORAM :

THE HON'BLE MRS. JUSTICE PRABHA SRIDEVAN

A.S.No.560 of 1993

M/s. M.Ramasamy and
Company represented by
its Partner M.Ramasamy
80, Thalaippan Street,
Virudhunagar,
Kamarajar District. .... Appellant/Plaintiff

Vs.

The Javadhu Hills
Hill Tribes, Large sized
Multi purpose Co-operative
Society Limited, represented
by its Special Officer,
Jamunamarathy (via)
North Arcot District. .... Respondent/Defendent

Appeal filed against the Judgment and Decree, dated 26.04.1993 rendered in O.S.No.48 of 1988 on the file of the Subordinate Judge, Tirupattur, North Arcot District.

1. For Appellant : Mr.S.Subbiah
For Respondent : Mr.V.Raghavachari

J U D G M E N T

The plaintiff is the appellant. The plaintiff is a registered firm, dealing inter alia in botanical crude drugs. According to the plaintiff, the defendant agreed to supply mavali kilangu (dried) of 5 mts before 31.01.1987 and its Special Officer received Rs.22,000/- by way of Demand Draft drawn on Canara Bank, Tirupattur and in acknowledgement of receipt of the same as advance, a letter was given by the Special Officer on 21.01.1987, Ex.A.2. The plaintiff had handed over 126 empty gunny bags to the defendant to effect the said supply. The defendant did not supply the products in spite of several letters written by the plaintiff. Because of the non-supply, the plaintiff incurred loss in the business. A legal notice was sent and thereafter, the suit was filed. The defendant in the

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written statement submits that there was no contract between the plaintiff and the defendant, the defendant society did not receive any Demand Draft for Rs.22,000/-, there was no contract to supply mavali kilangu. It appears that the plaintiff had entered into some dealing with the erstwhile Special Officer of the defendant society one K.P.Muthu. The Demand Draft was not drawn in favour of the defendant society, nor was it credited in their account, the entire correspondence between the plaintiff and the defendant appears to have been addressed to the aforesaid Muthu at his residence. He was suspended from service on 06.08.1987, the defendant society is not liable to pay the amount. It came to know of all the transactions, only after the suit summons was received. The 126 gunny bags referred to in the plaint was not received by the defendant society. The letters mentioned in the plaint has having been addressed to the plaintiff on behalf of the defendant society were not on behalf of the society and therefore, the suit should be dismissed.

2. Before the trial court, 12 documents were marked by the plaintiff, who examined himself as P.W.1. On behalf of the defendant 5 documents were marked and the then Secretary was examined as D.W.1.

3. The learned counsel for the plaintiff submitted that Ex.A.2, which is the receipt for a sum of Rs.22,000/- towards advance has been issued in the letter head of the defendant society and the signature of K.P.Muthu, who was the then Special Officer has also been admitted by D.W.1. Therefore, this establishes the contract. Once the contract is established and the supply of the goods, as per the contract is not effected, then the defendant is liable to refund the advance. The learned counsel submitted that it is not as if the plaintiff is relying on only Ex.A.2, there are other documents to support his case. Ex.A.3, dated 23.02.1987 is written by the same Special Officer to the plaintiff, promising to send the consignment. Ex.A.4 is another letter addressed by the same person, promising to supply 103 bags of mavali kilangu, again Ex.A.5 is the assurance by the same person for delivery of 126 bags of the said produce. Ex.A.6 is the legal notice, Ex.A.7 is an extract of the accounts of the plaintiff, which shows the amounts due from the defendant. Ex.A.8 and Ex.A.9 are acknowledgement cards. Ex.A.10 is the way bill to show the despatch of gunny bags. Ex.A.11 and Ex.A.12 are grievance addressed by the plaintiff to the Chief Minister grievance cell.

4. The learned counsel for the appellant submitted that if the defendant has to escape his liability, they should have produced their account books to show that the proceeds from the Demand Draft were not credited to their account. The plaintiff had only been dealing with K.P.Muthu, as the Special Officer of the defendant society and therefore, any loss incurred by the plaintiff in the transaction with the said Special Officer, the society is bound to make good. The learned counsel submitted that once a contract is established, it is for the defendant to show that there is in fact no contract, otherwise he is liable to refund the advance.

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5. The learned counsel for the respondent, on the other hand, would submit that the defendant had not received the amount, for which Ex.A.2 is said to have been issued. The Demand Draft was in fact endorsed not in the name of the defendant society, but in the name of the Special Officer, as seen from P.W.1's evidence. Ex.A.5 showing despatch of 126 gunny bags, does not actually prove anything because the way bill receipt does not bear the name of the consignee and it is the admission of P.W.1 that he has not produced the bill for the discharge of 126 gunny bags. The learned counsel submitted that no adverse inference can be drawn on the ground that the respondent did not produced the account book, since it was never called upon to produce the same and for this purpose, relied on Standard Chartered Bank vs. Andhra Bank Financial Services Ltd., (2006) 6 SCC 94.

6. The learned counsel also submitted that the society cannot be held to be liable for any criminal act of the Special Officer in his personal capacity. The learned counsel also pointed out that it is the admission of P.W.1 that all the letters were addressed to the Special Officer and not to the official address of the society.

7. The signature in Ex.A.2 is admitted as the signature of the Special Officer. It is on this ground that the appellant claims that he is entitled to the suit claim. In his evidence, as P.W.1, he has stated that the Demand Draft was not endorsed in favour of the society. In his chief examination, he has stated that his contract was not with K.P.Muthu in his personal capacity, but only as a Special Officer of the society. According to him, Ex.A.2 contract was entered into in the residence of K.P.Muthu. The plaintiff does not know that the registered office of the defendant society is in Jamunamarathy. Several letters, which are mentioned in paragraph 5 of the plaint were marked. He has admitted that no notice was sent by him to the Registered Office of the society. He has also admitted that he has not filed the receipt of discharge of 126 gunny bags and he has denied the suggestion that he did not sent the gunny bags to the society. DW.1, of course has admitted the signature of Muthu in Ex.A.2 and he has also stated that what ever the acts he had done on behalf of the society till 09.06.1987 would bind the society, but he has denied that the sum of Rs.22,000/- was credited to the account of the society. The defendant produced the sample receipt book and the sample suspense account book. D.W.1 has denied the receipt of 126 gunny bags for effecting supply of mavali kilangu.

8. The plaintiff, while reiterating that his contract was only with the defendant society, had chosen to endorse the Demand Draft in favour of K.P.Muthu in his individual capacity, this is admitted by him. In view of this admission, the production of Ex.A.2 does not advance his case. It is no doubt true that the signature is admitted, it is also in the letter head of the defendant society, but if we read the evidence of P.W.1, it is apparent that the plaintiff entered into contract at the residence of K.P.Muthu, he endorsed the Demand Draft in favour of the same person. The Inland Letter, Ex.A.3 does not bear the stamp of the society. The legal notices are sent not to the society, but addressed to K.P.Muthu. The

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plaintiff admits that all the correspondence are addressed to Pachal village, where the Special Officer resided. Until the suit summons was received by the defendant, they had no knowledge of this transaction. The plaintiff has not produced any evidence to show that the society had knowledge of this transaction or that ht brought to the knowledge of the society that there was a contract for supply of the forest produce.

9. When the defendant in their written statement had stated clearly that their accounts do not reflect the receipt of Rs.22,000/-, the plaintiff could have called upon them to produce the said account. This is what the Supreme Court says in this regard in Standard Chartered Bank vs. Andhra Bank Financial Services Ltd., (2006) 6 SCC 94.

> " 51. This argument is met by learned counsel for SCB. An adverse inference is a presumption which the court is entitled to draw under Section 114 of the Evidence Act, 1872 read with illustration (g) thereto. Mr.Jethmalani contended that the weight of the authorities would show that unless there are some special circumstances making it obligatory for a party to produce evidence, no adverse inference can be drawn unless a party has been called upon to or ordered to produce evidence and fails to do so. Mr.Jethmalani relies on Bilas Kunvar v. Desraj Ranjit Singh, (AIR 1915 PC 96), Ramrati Kuer v. Dwarika Prasad Singh, (AIR 1967 SC 1134, and Indira Kaur v. Sheo Lal Kapoor, (1998) 2 SCC 488.
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> 52. In Hiralal v. Badkulal, AIR 1953 SC 225 case, this Court reiterated the observations of the Privy Council in Murugesan Pillai v. Manickavasaka Pandara, (AIR 1917 PC 6), where the Privy Council laid down the general rule of procedure that instead of relying on the abstract doctrine of onus of proof a party to the suit "desiring to rely upon a certain state of facts" ought not to withhold from the court the written evidence in his possession. In Gopal Krishnaji Ketkar v. Mohd. Haji Latif case, the observation in Murugesan Pillai v. Manickavasaka Pandara, (AIR 1917 PC 6) was reiterated and it was observed :(SCR p.866 F)
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> " Even if the burden of proof does not lie on a party the court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof."

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S.P.Chengalvaraya Naidu v. Jagannath, (1994) 1 SCC 1, was a situation of a fraudulent litigant basing his case on falsehood and withholding vital documents. Citibank N.A. v. Standard Chartered Bank, (2004) 1 SCC 12, merely relied on the observations made in Murugesan Pillai v. Manickavasaka Pandara, AIR 1917 PC 6 and Gopal Krishnaji Ketkar both of which say that it is not a sound practice for those "desiring to rely upon a certain state of facts to withhold from the court" the best evidence which is in their possession.

53. On the other hand, the three authorities on which Mr.Jethmalani relied independently take the view that unless a party is called upon to produce evidence or ordered to do so by the court and fails to do so, no adverse inference can be drawn against such party Mr.Jethmalani distinguished the two apparently contradictory lines of authorities by pointing out that in the authorities relied on by Mr.Kapadia the facts showed that there was a special obligation upon the party concerned to produce the relevant documents even without being called upon or ordered to do so and that the party had failed to produce them. Further, he pointed out that the observations of the Privy Council originating from Murugesan Pillai which have been reiterated in the subsequent cases including Citibank would apply only if the party is "desiring to rely upon a certain state of facts." He rightly contends that the 15% arrangement was neither any part of SCB's case, nor was SCB desiring to rely on the said state of facts. In the circumstances, there was no obligation upon SCB to produce any documents to prove the case put forward by CMF; there was no situation in which adverse inference could be drawn against SCB. Finally, Mr.Jethmalani also urged that irrespective of what the parties did, the Special Court could have, if it was so minded, invoked its power under Section 165 of the Evidence Act, 1872 and directed production of all documents it considered relevant instead of relying on adverse inference which was doubtful in the circumstances. This is particularly so with regard to the argument of CMF that the computer spreadsheets had not been produced, as para 7 of the written statement of CMF indicates that CMF was aware of the existence of such sheets and yet failed to call upon SCB to produce it or seek an order for production thereof from the Special Court."

10. The plaintiff also is unable to produce any evidence that the 126 gunny bags, which was sent for discharge of the kilangu was received by

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the society. The way bill does not prove anything, since this transaction till then appears to have been only with the Special Officer in his individual capacity. To bind the society for any action of the Special Officer, the plaintiff should show or should claim that he was all along under the impression that he was dealing only with the society. Of course, he has stated in his Chief Examination that the contract was not with K.P.Muthu in his individual capacity, but only as Special Officer of the Society, but in his cross examination, he admits that he does not know that the registered office of the society is in Jamunamarathy. The contract was also as early as stated entered only in the residence of the said individual. Therefore, the plaintiff had not proved that he was under the impression that he was dealing with the society. The plaintiff should have proved this in view of the defence taken in the written statement that none of the letters have been issued on behalf of the society, no letters said to have been addressed to the society, have in fact been received by them and the advance has not been credited to the account. There does not appear to be any error in the judgment of the trial court. Hence, the appeal is dismissed.

tsvn

sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1.The Subordinate Judge
Tirupattur, North Arcot District.

2. The Section Officer ,
V.R.Section, High court Madras.

+ 1 cc to Mr.V.Raghavachari Advocate SR.NO.36059
+ 1 cc to Mr.S.Subbiah Advocate SR.NO.36082

ASM(CO)
RD 21.8.07

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